shares by a corporation, the contrary view would seem more sound, since such a purchase does not merge the stock, which may be reissued.[16]

In the recent case of *Wilson* v. *Torchon Lace & Mercantile Co.* (Mo. 1912) 149 S. W. 1156, the plaintiff sought specific performance of a contract under which he had purchased stock in the defendant corporation, and by which the latter had agreed to repurchase the same at the plaintiff's option. The court refused relief, holding that a corporation has no power to contract to purchase its own stock,[17] and that since the plaintiff had received and disposed of dividends, he did not come into equity with clean hands. Since the transaction was in good faith and the corporation was solvent at the time, the first part of this decision, at any rate, seems contrary to the better view, and moreover, it is opposed to the weight of authority.[18]

APPLICABILITY OF THE DOCTRINE OF PART PERFORMANCE TO EXECUTED TRANSACTIONS.—The question of the applicability of the equitable doctrine of part performance to cases of executed transactions is raised in the late case of *Tyler Commercial College* v. *Stapleton* (Okla. 1912) 125 Pac. 443. The defendant, who had taken a parol assignment of a lease from the lessee and had entered into possession, abandoned the premises before the expiration of the lease. The court allowed the lessor to recover the rent for the balance of the term,[1] holding that going into possession constituted sufficient part performance to take the case out of the Statute of Frauds. This holding invites inquiry into the true basis of the doctrine of part performance.

As a conveyance is by its nature not executory but completely executed at the time when made, there can obviously be no performance of it, and the expression "part performance" is clearly inaccurate, therefore, when used as a basis for equitable jurisdiction to enforce a gift, lease or assignment made by parol.[2] The expression would seem to be as much of a misnomer, however, when applied to executory contracts; for in the ordinary contract for the purchase of land, where

[16]Ralston *v.* Bank of California (1896) 112 Cal. 208; Hartridge v. Rockwell *supra;* Comm. v. B. & A. R. R. Co. (1886) 142 Mass. 146; City Bank of Columbus v. Bruce (1858) 17 N. Y. 507. It is suggested that a purchase of its stock by a corporation is analogous to the purchase for value and before maturity of a negotiable instrument by its maker and its subsequent reissue by him. Stock thus purchased may not be voted, however. American Ry. Frog Co. *v.* Haven (1869) 101 Mass. 398; M'Neely *v.* Woodruff (1833) 13 N. J. L. 352.

[17]In this connection the case of Vent *v.* Duluth Coffee & Spice Co. (1896) 64 Minn. 307 is of interest. In that case it was held that an agreement similar to the one in the principal case was a conditional sale rather than an agreement to repurchase, and was consequently valid.

[18]Iowa Lumber Co. *v.* Foster (1878) 49 Ia. 25; First Nat. Bank *v.* Peoria Watch Co. (1901) 191 Ill. 128; Dupee *v.* Boston Water Power Co. (1873) 114 Mass. 37; Chicago R. R. *v.* Marsailles, *supra;* Hartridge *v.* Rockwell *supra;* Pabst *v.* Goodrich (1907) 133 Wis. 43.

[1]*Accord,* Dewey *v.* Paine (1886) 19 Neb. 540; Carter *v.* Hammett (N. Y. 1851) 12 Barb. 253; *cf.* Edwards *v.* Spalding (1897) 20 Mont. 54; Baker *v.* Maier (1903) 140 Cal. 530; but see Chicago etc. Co. *v.* Davis etc. Co. (1892) 142 Ill. 171; Welsh *v.* Schuyler (N. Y. 1876) 6 Daly 412.

[2]1 Tiffany, Landlord & Tenant, 258; Banerji, Specific Relief, 26.

the vendor's agreement is to convey and the purchaser's to pay the purchase price, payment in part or whole by the latter is the only performance he is capable of, and yet by the nearly universal rule such payment will not remove the contract from the bar of the Statute.[3] But, on the other hand, if the purchaser enters into possession,[4] or, after taking possession, makes improvements,[5] the contract will be specifically enforced,[6] though the performance of these acts is in no way a part of his agreement.[7]

"Part performance" is, then, an inaptly chosen expression used to cover the two theories which afford the bases for the interference of equity in avoiding the Statute of Frauds. One theory is that part performance is evidence of an agreement and is a valid substitute for the requisite writing. As the Statute makes no provision for any such substitute this is a clear instance of judicial legislation. While courts to-day do not expressly base relief on this theory, nevertheless from it is derived the general rule that equity will enforce a parol agreement when there has been some unequivocal act referable only to the subject matter of the controversy.[8] Under this rule a payment of money is regarded as equivocal,[9] while entry into possession, particularly when coupled with the making of improvements, is usually accepted as removing the bar of the Statute.[10] Since part performance is, under this theory, merely evidence of a parol transaction, it should not give equity jurisdiction of any case of which cognizance could not be taken if there were a writing,[11] though, on the other hand, there seems to be no ground for the holding, adopted by some courts,[12] restricting the doctrine to cases involving land.[13]

The second theory included under the doctrine of part performance is that constructive fraud gives equity jurisdiction.[14] If one party, in reliance on an oral agreement, has so far changed his position as to suffer irreparable injury if the other party is permitted to repudiate the agreement, equity will interfere, on the ground that the Statute of Frauds should never be used to work a fraud.[15] In such a case it is

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[3]1 Ames, Cases in Equity Jurisdiction, 276, *n.* 1.

[4]Butcher *v.* Stapely (1685) 1 Vern. 364; Puterbaugh *v.* Puterbaugh (1891) 131 Ind. 288.

[5]Hays *v.* Kansas etc. Co. (1891) 108 Mo. 544; Stillings *v.* Stillings (1893) 67 N. H. 584.

[6]But see Burns *v.* Daggett (1886) 141 Mass. 368.

[7]See 4 COLUMBIA LAW REVIEW 294.

[8]Ungley *v.* Ungley (1877) L. R. 5 Ch. D. 887; Frame *v.* Dawson (1807) 14 Ves. Jr. 386; see Dale *v.* Hamilton (1846) 5 Hare 368, 381.

[9]See Frame *v.* Dawson *supra;* Dale *v.* Hamilton *supra.*

[10]Morphett *v.* Jones (1818) 1 Swan. 172, 181; Wills *v.* Stradling (1797) 3 Ves. Jr. 378; Pomeroy, Specific Performance, (2nd ed.) §§ 115, 126.

[11]See Pomeroy, Specific Performance, (2nd ed.) § 99.

[12]Brittain *v.* Rossiter (1879) L. R. 11 Q. B. D. 123; Osborne *v.* Kimball (1889) 41 Kan. 187; McIlroy *v.* Ludlam (1880) 32 N. J. Eq. 828.

[13]Browne, Statute of Frauds, (5th ed.) § 460-*a;* see 12 COLUMBIA LAW REVIEW 282.

[14]4 COLUMBIA LAW REVIEW 294; 2 Story, Equity Jurisprudence, (13th ed.) § 761; Browne, Statute of Frauds, (5th ed.) § 448.

[15]Burns *v.* Daggett *supra;* Burkholder v. Ludlam (Va. 1878) 30 Gratt. 255; Freeman *v.* Freeman (1870) 43 N. Y. 34; Slingerland *v.* Slingerland (1888) 39 Minn. 197.

the part performance itself which affords jurisdiction, and cognizance may be taken of transactions in which the relations of the parties would be purely legal save for the absence of the requisite writing. It is clear that this is the true ground for jurisdiction in cases of gifts, leases, and assignments.[16] Confusion has been caused, however, by the two-fold origin of the doctrine of part performance.[17] Thus some courts refuse relief unless there is both an unequivocal act and an irreparable change of position,[18] though proof of each of these facts should be necessary only upon a theory entirely distinct from that requiring proof of the other. The Oklahoma court seems to have been led astray by this confusion. Although a court of equity should acquire jurisdiction over the assignment of a lease only on the constructive fraud theory, relief was granted to the plaintiff upon proof of a mere entry into possession by the assignee of the lease. The plaintiff had in no way changed his position, and therefore the court must obviously have considered that the efficacy of the "part performance" depended upon its value as evidence, in a case where the application of the doctrine should logically be based only upon constructive fraud.[19]

ESTOPPEL OF A MUNICIPAL CORPORATION BY RECITALS IN ITS BONDS.—Out of the mass of litigation that has arisen from an investor's reliance upon recitals in bonds and a subsequent repudiation by a municipality of such obligations, there has evolved a well established and uniformly applied principle: that inasmuch as an estoppel can be invoked only by a *bona fide* purchaser without notice,[1] a municipality can never be estopped to deny the existence of legislative authority to issue bonds.[2] For while a purchaser is not necessarily charged with knowledge of the happening of a condition precedent to the exercise of duly conferred power, he is bound to know the law which confers authority, though its exercise be based upon a contingency.[3] Moreover, if a municipality could confer power upon itself by a recital that it had such power, the constitutional limitation upon the power of a municipal body, that it may incur indebtedness only when authorized by the legislature, would be rendered illusory and ineffectual.[4] The absence or unconstitutionality of a statute authorizing its creation, therefore, is always available as a defense in an action to enforce the payment of a municipal indebtedness.[5]

On this principle the courts agree, but several of the state courts refuse to distinguish between a total lack of power and the absence

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[16]See Burkholder *v.* Ludlam *supra;* Freeman *v.* Freeman *supra.*

[17]See 6 COLUMBIA LAW REVIEW 524.

[18]Hart *v.* Carroll (1877) 85 Pa. 508; see 4 COLUMBIA LAW REVIEW 294.

[19]See Burns *v.* Daggett *supra;* Welsh *v.* Schuyler *supra;* Ann Berta Lodge *v.* Leverton (1875) 42 Tex. 18; 1 Tiffany, Landlord & Tenant, 258, 955, 974 *n.*

[1]See Stow *v.* Montgomery (1883) 74 Ala. 226.

[2]Commissioners *v.* Call (1898) 123 N. C. 308; South Ottawa *v.* Perkins (1876) 94 U. S. 260.

[3]See Coloma *v.* Eaves (1875) 92 U. S. 484.

[4]2 Dillon, Municipal Corporations, (5th ed.) § 933.

[5]2 Dillon, Municipal Corporations, (5th ed.) § 961; Litchfield *v.* Ballou (1884) 114 U. S. 190.